Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF PETITIONERS
In No. 90-1262

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QUESTIONS PRESENTED

The Clean Water Act provides that all publicly and privately owned facilities intending to discharge any effluent into the nation's waters must obtain a discharge permit from the U.S. Environmental Protection Agency or from a designated agency in the source state. To obtain a permit under this National Pollutant Discharge Elimination System (NPDES), the facility (or point source) must demonstrate that the discharge will both meet the technology-based effluent limitations set by EPA and comply with the approved water quality standards of the source state.

At issue in this petition is whether the court of appeals erred by holding that the Clean Water Act imposes two further conditions on the issuance of NPDES permits. The specific questions raised by the court's decision and this case are:

(1) Whether a facility must also comply with the water quality standards of all downstream states, regardless of their terms and severity, and furthermore, whether EPA lacks any discretion in applying those downstream standards; and

(2) Whether a pre-existing violation of water quality standards on any downstream segment, in either the source state or any downstream state, automatically precludes the issuance of new permits.

PARTIES TO THE PROCEEDINGS

The State of Arkansas, the Arkansas Department of Pollution Control & Ecology (A.D.P.C. & E.), the City of Fayetteville, Arkansas and the Beaver Water District, petitioners in No. 90-1262 before this Court, were all cross-petitioners in the court of appeals.

The U.S. Environmental Protection Agency (EPA) was the respondent in the court of appeals and is the petitioner in No. 90-1266 before this Court.

The State of Oklahoma, the Oklahoma Scenic Rivers Commission, the Oklahoma Pollution Control Coordinating Board, and Save The Illinois River (STIR) were petitioners in the court of appeals, and the Oklahoma Wildlife Federation was an intervenor on the side of Oklahoma. These Oklahoma parties are all respondents in both cases before this Court.

All of the Arkansas parties appearing as petitioners are governmental and public entities and have no subsidiaries, affiliates, or parent corporations. *See* Supreme Court Rule 29.1.

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BRIEF OF PETITIONERS In No. 90-1262

This case presents two fundamental questions affecting the regulation of the nation's waterways under the Clean Water Act: first, whether downstream state standards *must* be applied when making permit decisions for sources in upstream states, and second, whether the inability or failure of a waterway to attain existing state standards triggers a mandatory ban on new discharges into that waterway and its tributaries. The U.S. Court of Appeals for the Tenth Circuit adopted a rigid construction of the Act on both questions, which effectively eliminates the discretion of the permitting agencies that administer the Act.

The Arkansas parties [1] submit that this construction conflicts with Congress' affirmative assignment of responsibility to EPA and state permitting agencies for resolution of these questions on a case-by-case basis. The Tenth Circuit therefore misinterpreted the Act and exceeded its role as a reviewing court by overturning EPA's permit decision in this case.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 908 F.2d 595 (1990) and reprinted at Ark. P.A. 1a-86a. The four decisions by the Administrative Law Judge and the Chief Judicial Officer for the U.S. Environmental Protection Agency (EPA), which upheld the issuance of the permit in this case, are reprinted at Ark. P.A. 93a-107a, 108a-121a, 122a-144a, and 145a-153a. The permit is reprinted at J.A. 66-87.

JURISDICTION

The court of appeals entered its judgment on July 11, 1990. Ark. P.A. at 91a-92a. The court denied timely filed petitions for rehearing and rehearing *en banc* on October 11, 1990. Ark. P.A. at 87a-88a. The Tenth Circuit nevertheless granted a stay of mandate on October 31, 1990 pending the timely filing of petitions for certiorari. Ark. P.A. at 89a. This Court granted certiorari on April 1, 1991, and the mandate remains stayed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved here is the Federal Water Pollution Control Act, commonly referred to as the Clean

[1] The Arkansas parties include the State of Arkansas, the Arkansas Department of Pollution Control & Ecology, the City of Fayetteville, Arkansas, and the Beaver Water District. The Appendix to the petition for certiorari filed by these parties is cited here as "Ark. P.A.," and the Joint Appendix filed by all the parties as "J.A."

Water Act (CWA), 33 U.S.C. §§ 1251-1387.[2] The provision enacted in 1972 specifically to address the relevance of downstream state standards in the permitting process is section 402(b)(5). This section applies directly to permitting agencies in the thirty-nine states now authorized to administer their own permit programs and requires those agencies:

> To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to accept such recommendations together with its reasons for so doing.

Section 402(a)(3), which applies where EPA acts as the permitting agency, incorporates this same provision by specifying that EPA's program "shall be subject to the same terms, conditions and requirements as apply to a State permit program." Other relevant provisions of the CWA, including sections 301, 303, 401 and 510, are reprinted in Ark. P.A. at 154a-171a.

STATEMENT OF THE CASE

In the 1972 Amendments to the Clean Water Act, Congress created the National Pollution Discharge Elimination System (NPDES) and required every point source that discharges effluent into the waters of the United States to obtain a discharge permit. CWA § 402. Each applicant for the NPDES permit must meet two sets of conditions. First, each discharger must comply with national uniform technology-based effluent limitations that have been established by EPA for different

[2] For the Court's convenience, citations throughout are to the sections of the CWA. Parallel citations to the U.S. Code are provided in the Table of Authorities and in Ark. P.A. at 154a-171a.

categories and classes of discharges. CWA § 301(b)(1). Second, each discharger must ensure compliance with the applicable ambient water quality standards that have been established by the source state and then approved by EPA. CWA § 303. An NPDES permit translates both of these conditions into a single set of effluent limitations that a discharging facility must meet.

Factual Background. The City of Fayetteville, like most major municipalities, operates a wastewater treatment plant that collects and treats the wastewater produced by industrial, commercial, and residential facilities. Until recently, Fayetteville relied upon a plant built some twenty years ago that used older technology and had become responsible for fish kills and frequent violations of Arkansas' water quality standards on the White River. To correct this situation, Fayetteville decided to build a new, state-of-the-art plant incorporating the most sophisticated treatment technology that was currently available.[3]

After conducting numerous studies and approximately forty public hearings, Fayetteville chose a split-flow discharge design that would divide the facility's effluent into two equal discharge streams. Half of the effluent would be discharged into the White River, which flows into Beaver Reservoir approximately ten miles downstream from the point of discharge. Beaver Reservoir is the source of drinking water for most of Northwest Arkansas. The remaining effluent would be discharged into an unnamed creek, which flows two miles later into Mud Creek, which flows three miles more to Clear Creek, which then flows another thirteen miles before reaching the Illinois River. Twenty-two miles further downstream,

[3] The new Fayetteville plant, which cost $40 million to build, uses a combination of biological phosphorous removal and nitrification, rapid sand filtration, post-aeration, dechlorination, and effluent storage, in addition to conventional types of treatment. Even the Oklahoma Department of Health has acknowledged that the Fayetteville plant would provide the most thorough and complete treatment available and would result in no noticeable impact on water quality. *See* Ark. P.A. at 135a.

and approximately forty miles downstream from the point of the Fayetteville discharge, the Illinois River crosses the border into Oklahoma.[4]

The Agency Proceedings. In response to the application Fayetteville submitted for its new facility, EPA published a draft NPDES permit in July 1985 and held a public hearing on the proposed permit in August 1985.[5] Based on the evidence presented at the hearing, EPA issued a permit to the Fayetteville facility in November 1985.[6] In approving this permit, EPA found that the plant's proposed split-flow discharge would comply with the federally-approved Arkansas water quality standards on both the White and Illinois Rivers.

Moreover, the Agency found that the discharge would have *no* adverse impact on the water quality of Oklahoma, and therefore the section 401 requirement to notify an affected state and hold a public hearing on the interstate effects of the proposed permit was not triggered. *See* Ark. P.A. at 100a. The selection of the split-flow design for the Fayetteville facility minimizes any adverse environmental impact by utilizing the natural assimilative capacity of both the White and Illinois River basins.[7]

[4] Fayetteville chose this split-flow discharge because it minimized the overall environmental impact of the discharge, as explained below, and because it has the virtue of returning effluent to the same river basin generated the waste. Over half of the population that sends its wastewater to the Fayetteville facility lives in the Illinois River basin.

[5] EPA was the permitting agency because Arkansas had not been delegated permitting authority at the time of the original permit application. Arkansas' permit program has since been approved by EPA.

[6] The permit imposes very stringent limitations on the effluent that may be discharged by the facility, and also provides for even stricter limits if an ongoing study of the Illinois River shows a need for additional restrictions. *See* J.A. 84.

[7] "Assimilation" refers to the natural mechanisms in a waterway which remove nutrients such as phosphorous and nitrogen from the water, and includes processes such as sedimentation and incorporation into living organisms.

While discharging the entire effluent into either river basin would likely overwhelm a single river's assimilative mechanisms during some periods, the low concentration of nutrients in the effluent will be almost completely absorbed if the discharge is split between the two river basins.

Oklahoma and Arkansas have had a number of disputes over interstate waterways, however, and Oklahoma requested an evidentiary hearing in December 1985 to challenge the discharge into the Illinois River tributaries. EPA's Regional Administrator rejected most of Oklahoma's objections on their face, but did grant Oklahoma the opportunity to contest—at a discretionary hearing—EPA's determination that the Fayetteville discharge would not violate Oklahoma's water quality standards. The parties then submitted extensive expert testimony, and EPA's Administrative Law Judge (ALJ) conducted a three-day evidentiary hearing on this issue. After considering all of the evidence, the ALJ issued an initial decision upholding the permit. Ark. P.A. at 95a. The ALJ found that any adverse effect of the Fayetteville discharge on Oklahoma water quality "would be *de minimis* at most" and that the discharge would not have any "undue impact" on Oklahoma waters. *Id.* at 103a.

In response to Oklahoma's appeal, EPA's Chief Judicial Officer (CJO), acting for the Administrator, determined that the proper legal standard to apply in this case was whether the Fayetteville discharge would "cause an actual *detectable* violation of Oklahoma water quality standards." Ark. P.A. at 117a (emphasis in original). Thus, while the CJO did agree to require compliance with the Oklahoma standards in this case, the CJO recognized that an assessment of detectability was necessary for determining "compliance" under EPA's regulations and interpretation of the Act. *Id.* at 117a n.16. If the effect of the Fayetteville discharge on Oklahoma water quality was "not expected to be actually detectable or measurable," the ALJ should uphold the permit. *Id.*

On remand, the ALJ applied this legal test and concluded that the Fayetteville discharge would comply with each relevant Oklahoma water quality standard. Ark. P.A. at 122a. In weighing all the evidence presented in the pre-filed testimony and at the hearing, the ALJ rejected much of the testimony by Oklahoma's witnesses because it was based on incorrect assumptions and was substantially retracted or undermined during cross-examination. *See, e.g.*, Ark. P.A. at 131a, 136a. Based on the record in its entirety, the ALJ found that the Fayetteville discharge would have no detectable effect on Oklahoma water quality, would not in any way affect public health, and would not violate the Oklahoma standards for nutrients, aesthetics, dissolved oxygen, metals, or beneficial use limitations. Ark. P.A. at 126a-143a. In fact, the ALJ found that the Fayetteville effluent was so clean that it would actually *improve* several water quality parameters in the Illinois River in Oklahoma.[8] The ALJ's findings were upheld by the CJO on appeal by the Oklahoma parties. Ark. P.A. at 151a. The permit then went into effect, and the plant started operating under its approved permit in January 1989.

The Court of Appeals' Decision. Still unhappy with EPA's permit decision, the Oklahoma parties sought judicial review in the U.S. Court of Appeals for the Tenth Circuit. A protective petition filed by the Arkansas parties in the Eighth Circuit was also transferred to the Tenth Circuit, and that court ultimately reversed EPA's permit decision. On the first question presented here, the Tenth Circuit interpreted the Clean Water Act as

[8] *See, e.g.*, Ark. P.A. at 139a (discharge will result in net improvement of dissolved oxygen levels). Moreover, the evidence showed that the extremely low concentration of phosphorus in the Fayetteville effluent (the pollutant of greatest concern at the hearing) would be almost completely assimilated before reaching the Oklahoma border. Thus, because it will contribute proportionally more water than phosphorous, the Fayetteville discharge would actually result in a net *decrease* in the phosphorous concentration of the Illinois River as it enters Oklahoma.

requiring sources in upstream states to comply with any and all federally approved water quality standards of downstream states. Ark. P.A. at 43a. In reaching this conclusion, the court found that the statutory language and legislative history did not clearly reveal Congress' intent. *Id.* at 18a-19a, 42a-43a. Nevertheless, EPA had decided to require compliance in this case with the Oklahoma standards, and based on its view of the Act as a whole, the Tenth Circuit concluded that mandating compliance with downstream state standards was "reasonable and consistent with Congress's purposes in enacting the CWA." *Id.* at 19a.

The court sharply disagreed with EPA's application of this requirement, however. In particular, the Tenth Circuit rejected EPA's interpretation of Oklahoma's water quality standards, and held that EPA was not entitled to any discretion in interpreting or applying those standards. Ark. P.A. at 45a-53a. Moreover, the court summarily rejected the CJO's interpretation of the Act and regulations as providing that, so long as the Fayetteville discharge would not cause any "detectable" violation of the downstream Oklahoma standards, the discharge here would "comply" as a matter of federal law with those standards. *See id.* at 53a; *supra* pages 6-7. When combined with the court's decision that downstream state standards must be applied, this construction of the statutory scheme eliminates all flexibility for EPA and state permitting agencies and instead grants downstream states an unfettered veto power over permits in upstream states, regardless of how extreme or unfair the application of the downstream standards might be.

In the holding giving rise to the second question presented, the Tenth Circuit then ruled that another requirement, which the court found implicit in the statutory scheme though not addressed by the parties, absolutely precluded issuance of the permit in this case. Specifically, the court held that any pre-existing violation of a downstream water quality standard triggers a mandatory ban on new permits for upstream discharges that contain the

same pollutant. Ark. P.A. at 53a-54a, 79a-80a. This permit ban even precludes discharges that would have no detectable effect on downstream water quality, provided *some* amount of the effluent, albeit undetectable, is predicted to reach the downstream segment with the existing violation.

Since EPA had made no findings regarding this new requirement, the court undertook its own "examination" of the record and found that Oklahoma's anti-degradation policy was being violated before the Fayetteville facility began discharging. *Id.* at 55a-64a. Given the court's first holding that these Oklahoma standards apply to upstream Arkansas facilities, the Tenth Circuit therefore concluded that this pre-existing downstream violation operated as an absolute ban on the new Fayetteville discharge, irrespective of the fact that Fayetteville did not cause or contribute to the existing violation, and regard'ess of how stringently Fayetteville controls its effluent.

SUMMARY OF ARGUMENT

The court of appeals went far beyond the proper role of a reviewing court in deciding both of the questions presented. As this Court has emphasized in a series of recent decisions, reviewing courts must respect the plain statutory language and the expressed intent of Congress. *See, e.g., Chevron, U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S 837, 842-43 (1984). When Congress has spoken, courts are not free to ignore that direction. Furthermore, even on issues where Congress' intent is ambiguous, courts are not free simply to impose their own interpretation, regardless of whether they believe that interpretation would best serve the statutory purposes. Rather, the agencies delegated this responsibility by Congress must resolve such questions in the first instance and reconcile the competing policies underlying most statutory schemes. *Id.*

Congress *has* spoken to both of the questions presented here, and it provided a different answer than the Tenth

Circuit. On the first issue, Congress specifically gave permitting agencies the discretion to make permit applicants satisfy a downstream state's water quality standards. A source state's standards are directly applicable; a downstream state's standards are neither applicable nor wholly irrelevant. Rather, Congress intended for permitting agencies to decide on a case-by-case basis whether to impose additional conditions on a discharger, in light of the downstream state standards and a facility's impact on that state's water quality. By interpreting the Clean Water Act to always require unswerving compliance with a downstream state's standards, and eliminate all discretion for permitting agencies, the Tenth Circuit more than ignored Congess' intent. It adopted a construction foreclosed by that intent and the specific provisions Congess enacted to address the issue. *See infra* Section I.

The Tenth Circuit's decision on the second issue is even more severely flawed. As demonstrated by several provisions in the Act that the court never once mentioned, Congress intended to afford broad latitude to the states whose waterways had not yet attained the applicable water quality standards. Over time, those waterways must be brought into compliance, but individual states determine the timetable, set the priorities, and have authority to allocate the burden across all dischargers. The Tenth Circuit's imposition of an immediate and absolute permit ban, based on its view of the statutory purposes, thus conflicts irreconcilably with Congress' intent. Moreover, even if the court somehow thought Congress' intent was ambiguous, the responsibility for developing a nonattainment "remedy" rested with EPA, and EPA's current administration of the Act also precludes the court's remedy. *See infra* Section III.

The Tenth Circuit therefore lacked any basis for overturning the Fayetteville permit. Indeed, even if a downstream state's standards were legally applicable to out-of-state sources, the findings EPA made in this case adequately supported issuance of the permit. As part of its

permit decision, EPA determined that the Fayetteville facility would comply with the Oklahoma standards, because the discharge would not have any detectable effect on Oklahoma's water quality. This determination comes well within the Agency's discretion. Moreover, the "errors" found by the court in EPA's permit decision are demonstrably harmless and could not have affected the ultimate conclusion to grant the permit. *See infra* Section II. Accordingly, the Tenth Circuit's decision should be reversed, the Oklahoma challenges dismissed, and the Fayetteville permit upheld.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT MAKE DOWNSTREAM STATE STANDARDS BINDING IN PERMIT DECISIONS FOR OUT-OF-STATE FACILITIES.

When Congress rewrote the Clean Water Act in 1972 and created the NPDES permit system, it expected the program would be administered principally by the states. Accordingly, Congress created a regulatory structure that maintained individual state responsibility, yet also contained provisions that would force progressive improvement in the quality of the nation's waters. As the primary mechanism to improve water quality, Congress relied on technology-based effluent limitations that would be set by EPA and periodically upgraded to reflect improvements in control technology.[9]

As a supplementary mechanism, Congress also retained a requirement that states adopt and enforce ambient

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[9] CWA § 301(b)(1). *See* S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Senate Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1415, 1425 (1973) (hereinafter Leg. Hist. of 1972) (the 1972 Amendments propose "a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits"). *See also EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

water quality standards. CWA § 303. To promote nationwide uniformity in these standards, Congress directed EPA to review the standards adopted by states and ensure that the standards meet federal minimum requirements. In light of the possibility that some adjoining states might still adopt inconsistent standards, however, Congress created a specific procedure in the 1972 Amendments for resolving interstate disputes over water quality.

In creating this procedure, Congress chose not to enact a rigid rule making downstream state standards automatically applicable or a rule making them wholly irrelevant. Rather, the procedure Congress enacted requires permitting agencies to decide on a case-by-case basis whether additional effluent limitations are necessary to protect the waters of downstream states. The Tenth Circuit thus misconstrued the Act by mandating strict compliance with downstream state standards, and as shown in Section I.B below, the court otherwise lacked any statutory basis for overturning EPA's finding that no additional limitations were needed here to protect Oklahoma waters.

A. Congress Specifically Granted Permitting Agencies Discretion In Their Consideration Of Downstream State Standards.

Congress' unambiguous intent that permitting agencies be given case-by-case discretion in their consideration of downstream state standards is demonstrated by the specific statutory provisions Congress enacted to govern interstate water quality disputes. The Clean Water Act's legislative history and its other provisions striking a careful balance among state and federal powers further compel this interpretation of Congress' intent and the Act. *See infra* pages 18-31. Indeed, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), this Court has already rejected once the contrary interpretation adopted by the Tenth Circuit, and Congress also rejected that interpretation when it decided against amending the Act in 1987.

1. The Provisions Congress Enacted To Govern Interstate Water Quality Disputes Do Not Require Automatic Compliance With The Standards Of Downstream States.

The central provision in the Clean Water Act for resolving interstate water quality disputes is section 402(b)(5). This section is the controlling provision both when the source state and when EPA has permitting authority. Section 402(b)(5), which was included as part of the NPDES permit program enacted in the 1972 CWA Amendments, provides for a consultative mechanism which requires permitting agencies to consider the standards of downstream states, but does not require the automatic application of those standards.[10] Under this scheme, EPA is given ultimate authority to determine on a case-by-case basis whether a permit should contain additional conditions in light of downstream state water quality standards.

As this Court is all too well aware, interstate disputes about water quality antedated the permit program established by the 1972 CWA Amendments.[11] Recognizing that these disputes involve sensitive issues of federalism and state sovereignty, Congress enacted specific provisions assuring that the legitimate interests of both upstream and downstream states would be considered. In the event that states cannot resolve their differences, the Act makes EPA the federal arbiter to ensure that disputes are resolved equitably.

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[10] By providing special provisions that specifically address only the application of downstream standards, it is clear that Congress intended permitting agencies to treat downstream standards differently than source state standards. By treating the two types of standards identically, the Tenth Circuit's holding contradicts Congress' scheme.

[11] *See, e.g., Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *Missouri* v. *Illinois*, 200 U.S. 496 (1906).

Section 402(b)(5), the specific provision intended by Congress to resolve interstate disputes, applies directly when the source state acts as the delegated permitting authority, which Congress expected to become the norm over time.[12] Under section 402(b)(5), the permitting agency in the source state must provide an opportunity for any "affected" state to submit written recommendations with respect to a proposed permit. Neither this provision nor any other section of the Act, however, imposes an affirmative obligation on the permitting agency to accept the downstream state's recommendations. Instead, section 402(b)(5) recognizes that the state permitting agency may well decline to accept those recommendations, and in that event, expressly requires *only* that the permitting agency notify the downstream state of its reasons for *not* accepting that state's recommendations.

Furthermore, section 402(d)(2) provides that if the source state decides not to accept a downstream state's recommendations, EPA is authorized but *not required* to veto the permit. EPA's decision on whether to veto a permit is completely discretionary with the Agency, and a decision to *not* veto a permit is not subject to judicial review. *District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980).[13] Thus, when downstream and source states differ over whether a proposed discharge should be permitted, section 402(b)(5) requires both states to articulate the reasons for their positions. The source state

[12] Thirty-nine states have now been delegated permitting authority, and thus section 402(b) directly applies to most NPDES permits. [1 State Water Laws] Env't Rep. (BNA) 611:0111 (Mar. 1990).

[13] *See also Mianus River Preservation Comm'n* v. *EPA*, 541 F.2d 899, 907-09 (2d Cir. 1976) (the decision to not veto a permit is committed to the agency's "almost unfettered discretion"); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977) ("the legislative history makes very clear that Congress intended EPA to retain discretion to decline to veto a permit even after the agency found some violation of application guidelines").

agency then makes the decision whether to impose additional limitations in the permit, and EPA can review the written justifications for each state's position to determine whether the source state has adequately protected the interests of the downstream state.

Congress provided the same discretionary authority for situations where EPA acts as the permitting agency, by incorporating section 402(b)(5) into section 402(a). In particular, section 402(a)(3) provides that NPDES permits issued by EPA "shall be subject to the same terms, conditions, and requirements" as apply to state permits under section 402(b). Together, sections 402(a) and 402(b) serve as the source of authority for both EPA and state agencies to issue permits under the NPDES system, and this focal provision expressly treats downstream state standards as a relevant, but not necessarily binding, consideration.

Although the provisions that Congress retained in 1972 from the predecessor legislation are less probative, the same intent to focus on source state requirements and allow discretionary treatment of downstream state standards is reflected in section 401(a) of the Act, which Congress adopted in 1970 before creating the NPDES permit program.[14] Specifically, section 401(a)(2) requires EPA to determine whether the approval of a federal permit or license by a federal agency may "affect" the water quality of a downstream state. If EPA makes such a threshold determination, section 401(a)(2) requires EPA to notify the downstream state and then requires the federal permitting authority to consider any recommendations by an objecting state, along with any other evidence presented at a hearing. Significantly, this entire process applies only if EPA makes a threshold determination that the discharge may adversely affect the quality of a downstream state's waters, at which point the federal agency becomes ultimately responsible for consid-

[14] Federal Water Pollution Control Act Amendments, Pub. L. No. 91-224, § 102, 84 Stat. 91, 108 (1970) (enacting § 21(b)(2)).

ering all the recommendations and determining whether additional effluent restrictions are needed to protect the downstream state's water quality.[15]

Congress provided further evidence in section 401 (a) (1), a corollary 1970 provision, of its intent to focus on source state requirements and give permitting agencies more discretion regarding downstream state standards. This section requires the federal permitting authority to obtain a certification from the source state that the proposed discharge would comply with its requirements, including water quality standards. CWA § 401 (a) (1). If Congress also had intended strict and automatic compliance with the standards of a downstream state, it no doubt would have required certification from that state as well. Instead, however, Congress purposefully rejected multi-state certification in favor of requiring certification only from the source state when it selected the section 401 (a) (1) procedure and rejected a competing proposal to require certification from both the source state *and* any other affected state.[16] Thus,

[15] To the extent that section 401 (a) (2) and section 402 (b) (5) elaborate these requirements differently, section 402 is obviously controlling since it applies specifically only to NPDES permits and the language of section 401 was adopted in 1970, prior even to the creation in 1972 of the NPDES permitting program. Furthermore, since section 402 (b) (5) unambiguously gives state permitting agencies discretion in considering downstream state standards, and Section 401 (a) (2) does not apply to the state agencies, it would be highly anomalous to read section 401 (a) (2) as requiring strict compliance when EPA acts as the permitting agency under section 402 (a). Such a reading would make the substantive outcome of permit proceedings depend on the "fortuitous circumstances" of whether the source state had been delegated permitting authority by EPA. *See Costle* v. *Pacific Legal Foundation*, 445 U.S. 194, 197 (1980) ("we are unwilling to read the Act as creating such a seemingly irrational bifurcated system"). Moreover, it is inconceivable that Congress intended to give federal permitting authorities *less* discretion than source state permitting agencies when considering downstream standards.

[16] *Compare* H.R. Rep. No. 127, 91st Cong., 1st Sess. (1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 2691, 2710 (requiring certification from "the affected State or States") *with* Pub. L. No. 91-224, § 102, 84 Stat. 91, 108 (1970) (requiring certification only "from the State in which the discharge originates").

while section 401 (a) (1) does require certification and strict compliance with the standards of the source state, Congress deliberately required federal permitting agencies only to *consider* the *recommendations* of a downstream state.

This Court has already recognized in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), that sections 402 (b) and 401 (a) (2) are the key provisions enacted by Congress to resolve interstate water quality disputes. Furthermore, this Court expressly relied upon the interpretation of those provisions outlined above in holding that the Act preempted the application of downstream state law against out-of-state sources.[17] The Court explained that in enacting sections 402 (b) and 401 (a) (2), Congress provided a specific mechanism for resolving interstate

[17] Oklahoma has contended, and the Tenth Circuit concluded, that section 301 (b) (1) (C), rather than section 402 (b) (5), is the controlling statutory provision for deciding whether a permitting agency must automatically apply the standards of a downstream state. *See* Ark. P.A. at 19a-23a; Okl. Br. Opp. at 16-17. However, section 301 (b) is a general timing provision that describes the deadlines for meeting the statutory goals, as the heading of the subsection itself indicates. Moreover, unlike section 402 (b) (5), this provision does not specifically address the issue of interstate water quality disputes. Contrary to the Tenth Circuit's assumption, the word "any" in "any State law or regulations," as used in section 301 (b) (1) (C), modifies "law or regulations," rather than "States." The word therefore does not in any way signify that this phrase includes the standards of downstream states. Similarly, the phrase "applicable water quality standard" appearing later in this subsection does not even begin to address the question of whether a downstream state's standards are, in fact, "applicable." The Tenth Circuit's assumption to the contrary again simply begs the question. The legislative history of the CWA expressly states that Congress intended "applicable" water quality standards only to mean those standards which regulate the types of pollutants that are constituents of the effluent from a particular discharger. H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972), *reprinted in* 1 Leg. Hist. of 1972, at 753, 808.

water quality disputes, which gives EPA and the source state the discretion necessary to impose more stringent effluent limitations when required to adequately protect downstream water quality:

> The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution.

479 U.S. at 497.

As this Court further recognized, sections 402(b) and 401(a)(2) of the CWA make "it clear that affected States occupy a subordinate position to source States in the federal regulatory program." *Id.* at 491. A downstream state's water quality standards, while relevant, are not binding and may in EPA's discretion be applied or moderated as necessary to serve the overall public interest:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source . . . . Even though it may be harmed by the discharges, an affected State only has an *advisory role* in regulating pollution that originates beyond its borders. . . . [A]n affected state does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the *discretion* to disapprove the permit if he concludes that the discharges will have an *undue impact* on interstate waters.

Id. at 490-91 (emphasis added).[18] Until the decision below, all other federal and state appellate courts have uniformly adopted this same construction of the relevant provisions in the CWA.[19]

[18] The Tenth Circuit attempted to avoid this Court's construction of the relevant provisions of the Clean Water Act in *Ouellette* by characterizing it as dictum. Ark. P.A. at 26a. This depreciation of the Supreme Court's decision is not only dangerous, but wrong. This Court's construction of sections 402(b) and 401(a)(2) were an integral and essential part of its holding that these provisions conflicted with, and hence preempted, the application of the common law of a downstream state against a facility in an upstream state. Ark. Reply Br. at 5.

[19] *See, e.g., Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (downstream state's common law and water quality standards do not apply to out-of-state source); *National Wildlife Fed'n* v. *FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *State* v. *Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986), *cert. granted and remanded*, 479 U.S. 1061 (1987) (same).

2. The Act's Legislative History Further Confirms That Congress Did Not Intend To Make Downstream State Standards Binding On Out-Of-State Sources.

The legislative history of the Clean Water Act further demonstrates Congress' specific intent that EPA and state permitting agencies have discretion to determine on a case-by-case basis whether the water quality and standards of a downstream state warrant imposing additional permit conditions.

First, while Congress saw relatively little need in 1972 to amplify the clear meaning of sections 402(b)(5) and 402(a)(3), every explanation it did provide mirrored the statutory language requiring permit agencies to consider—but not necessarily accept—an objection based on downstream state standards.[20] Similarly, Congress consistently chose permissive language—such as "may then object" or "can veto"—to describe EPA's role in reviewing a state permit that does not require compliance

[20] *See, e.g.*, S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 139 (1972), *reprinted in* 1 Leg. Hist. of 1972, at 281, 322; 118 Cong. Rec. 10,219 (Mar. 27, 1972) (statement of Rep. Terry), *reprinted in* 1 Leg. Hist. of 1972, at 388-89.

with downstream state standards.[21] Indeed, Congress even added a provision that expressly allows EPA to waive its right to review and object to such a permit. CWA § 402(d)(3).

The language Congress used to explain the standard for EPA's exercise of its veto power also conveys Congress' intent that, far from expecting EPA to slavishly follow downstream state standards, EPA should make its own evaluation of whether the permitting state acted reasonably in deciding not to condition a permit on compliance with the downstream standards. For example, Congress explained that the Act authorizes (but does not require) EPA to veto a permit that would result in "unacceptable effects" on the waters of a downstream state or when the complaint of the downstream state is "reasonable." [22] This guidance confirms that Congress granted state permitting agencies and EPA broad discretion to weigh all factors, and consider all interests, in deciding whether to approve a permit with interstate effects. Significantly, nowhere did Congress state, either in connection with these provisions or the other 1972 amendments, that it intended to make downstream state standards applicable directly or to require strict compliance with such standards.

Second, the legislative history demonstrates that Congress intended to satisfy potential downstream state concerns by enacting an alternative approach. In particular, Congress attempted to prevent interstate disputes from arising in the first place by requiring EPA to review state water quality standards and ensure that they meet federal minimum requirements. CWA § 303(c). In other words, to improve the quality of interstate waterways and protect the interests of downstream states, Congress

[21] *See, e.g.*, 118 Cong. Rec. 33,761 (Oct. 4, 1972) (statement of Rep. Wright), *reprinted in* 1 Leg. Hist. of 1972, at 262; 118 Cong. Rec. 10,663 (Mar. 28, 1972) (statement of Rep. Terry), *reprinted in* 1 Leg. Hist. of 1972, at 581.

[22] *Id.* at 262, 581.

focussed primarily on forcing source states to adopt adequate standards. Thus, Congess specifically intended to address downstream state concerns by a fundamentally different approach than allowing downstream states to impose their standards extra-territorially on sources in upstream states.

Congress had originally sought to implement this approach in 1965, when it first required states to adopt ambient water quality standards for "interstate" waterways, which Congress thought were most likely to create tensions between the states.[23] In 1972, Congress substantially strengthened this requirement and reinforced its selection of this alternative approach. Under the new section 303, Congress bolstered EPA's authority to review state standards and even authorized EPA to promulgate federal standards if a state failed to adopt adequate measures. CWA § 303. Reflecting the same intent, section 103(a) of the rewritten Act specifically directs EPA to encourage interstate cooperation and the enactment of "uniform State laws relating to the prevention, reduction, and elimination of pollution."

As a result, Congress expected that the federal approval process for state standards would "insure uniform water quality standards across the Nation" and prevent states from creating pollution havens that may impair the water quality of downstream states.[24] Since an upstream state must adopt and enforce EPA-approved standards that will adequately protect water

[23] Even in 1965, Congress explained that the purpose of requiring states to adopt standards on interstate waterways was "to ensure that one State will not be polluting waters which also belong to others." 111 Cong. Rec. 8677 (1965) (statement of Rep. Dwyer). The concern for protecting downstream states from out-of-state discharges was also the primary motivation for Congress' decision to require federal approval of state standards. *See, e.g.*, 111 Cong. Rec. 8671 (1965) (statement of Rep. Ottinger); *id.* at 8678 (statement of Rep. Dwyer).

[24] 118 Cong. Rec. 10,795 (Mar. 29, 1972) (statement of Rep. Robison), *reprinted in* 1 Leg. Hist. of 1972, at 727.

quality, the likelihood that a discharge in an upstream state would cause an unacceptable impairment of a downstream state's water quality is greatly diminished. Congress therefore intended to deal directly with the possibility of insufficient upstream state standards, rather than make downstream state standards applicable to upstream sources through the permit process, as the Tenth Circuit surmised.

A third aspect of the legislative history that demonstrates Congress' intent arose in connection with the legislative review and reauthorization of the Clean Water Act in 1987. During the 1987 reauthorization, Congress considered two proposed amendments that were directly relevant to the issue of the extra-territorial application of downstream state standards. The first was a proposal in the Senate to restrict EPA's discretion by *requiring* the Agency to veto any permit that would cause a "substantial" downstream water quality violation.[25] In describing the Senate provision, the Conference Committee explained the difference between the existing law and the proposed amendment:

> Under current law, a State whose waters may be affected by the issuance of a permit in another State may submit recommendations to the permitting State. If those recommendations are not accepted by the

[25] S. 1128, 99th Cong., 1st Sess. § 117 (1985), *reprinted in* 2 Senate Comm. on Env't & Pub. Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987, at 1546, 1603 (1988) (hereinafter Leg. Hist. of 1987). In requiring EPA to veto only those permits that would result in "substantial" violations of downstream standards, the proponents of stricter compliance with such standards recognized the potential for abuse inherent in a scheme that required unbending compliance with downstream standards. The Senate Report accompanying the bill including this amendment stated that the requirement that downstream violations be substantial "assures that these provisions are not used by downstream States in an attempt to alter the water quality standards of upstream States in the absence of a significant pollution problem emanating from upstream States." S. Rep. No. 50, 99th Cong., 1st Sess. 49 (1985), *reprinted in* 2 Leg. Hist. of 1987, at 1420, 1470.

> permitting State, the Administrator *may* object to the issuance of the permit.
>
> The Senate bill requires the Administrator to decide the merits of such a dispute. Where the permitting State fails to accept the recommendations of the downstream State, the Administrator *shall* determine whether any substantial violation of a water quality requirement (including any standard) or adverse effect on the public health of the downstream State would result from the issuance of the permit. If so, the Administrator *must* object to the issuance of the permit or provide specific modifications to the permit.[26]

Thus, the Senate amendment would have changed EPA's veto authority from a discretionary function to a mandatory duty, albeit only for "substantial" downstream violations. The Senate amendment was not accepted by the House, however, and it was rejected in Conference, thereby preserving the "current law" that gives EPA discretionary authority.

The other relevant amendment that Congress considered in 1987, and did adopt, authorized EPA to treat Indian tribes as states under the Clean Water Act.[27] Several Congressmen expressed concern that such an amendment would cause intolerable confusion and uncertainty if the Act were interpreted to require sources in one "state" to comply with the standards of downstream "states."[28] Since Indian tribes would now be treated as "states" under the amendment, the number of jurisdictions that would be able to impose their standards on a particular facility under this construction of the Act would increase dramatically.

[26] H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 177 (1986), *reprinted in* 2 Leg. Hist. of 1987, at 690, 866 (emphasis added).

[27] Pub. L. No. 100-4, § 506, 101 Stat. 77 (1987) (enacting CWA § 518).

[28] *See, e.g.*, 133 Cong. Rec. 999 (Jan. 8, 1987) (statement of Sen. Hatch), *reprinted in* 1 Leg. Hist. of 1987, at 496; 133 Cong. Rec. 1589 (Jan. 21, 1987) (statement of Rep. Morrison), *reprinted in* 1 Leg. Hist. of 1987, at 550.

In the floor debates addressing this amendment, both the House and Senate proponents of the bill relied extensively on a memorandum reassuring members of Congress that neither the existing Act nor the 1987 Amendments required out-of-state sources to comply with the standards of downstream states:

> Where two or more states, sharing a common water body, have plans approved by EPA with differing standards of water quality, the Act does provide mechanisms for resolving inter-state conflicts. However, there is nothing in the existing Act or in the proposed amendments which gives EPA the power to force one state to changes [sic] its approved water quality standards or those valid activities done in accordance with its plan in order to accommodate the water quality needs of another state or states.[29]

Congress accordingly reauthorized and amended the Clean Water Act in 1987 with the express understanding that a downstream state cannot impose its standards on an out-of-state source.[30]

3. Making A Downstream State's Standards Applicable To Upstream State Sources Would Disrupt The Statutory Scheme And Congress' Careful Balance Among State Interests.

The Tenth Circuit's interpretation of the Clean Water Act conflicts, as shown above, with both the express

[29] 133 Cong. Rec. 1000 (Jan. 8, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Leg. Hist. of 1987, at 551; 133 Cong. Rec. 1282 (Jan. 14, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Leg. Hist. of 1987, at 395.

[30] Congress had already decided to adopt the amendment treating Indian tribes as states, and to reject the proposed amendment that would require EPA to veto permits that substantially impair the waters of a downstream state, when the *Ouellette* decision was announced. The 1987 Amendments were still pending, however, because President Reagan had vetoed the Water Quality Act of 1987 in late January of 1987. Following this Court's decision, both houses of Congress voted to override the President's veto in February 1987, *see* 1 Leg. Hist. of 1987, at 359, 313, 341, and Congress expressed no concern at that time about the *Ouellette* decision or indicated any inclination to alter the result reached by this Court.

language in the controlling statutory provisions and Congress' unambiguous expression of its intent in the legislative history. It also conflicts with the delicate balance Congress created in the overall statutory structure among the responsibilities of source states, downstream states, and EPA. As shown below, the Tenth Circuit's decision to give downstream state standards extra-territorial applicability cannot be reconciled with the balance struck by Congress, and, in fact, threatens to render the statutory scheme unworkable.

As one cornerstone of the 1972 Amendments, Congress assigned primary responsibility to the individual states for implementing the Act's programs. In so doing, Congress preserved the sovereignty of each state to adopt and enforce the regulations for sources and waters within its own borders. *See, e.g.*, CWA § 101(b) (the Act preserves the "primary responsibilities and rights of States"). Although Congress circumscribed the states' minimum authority to adopt standards lower than the requirements set by EPA, it recognized that some states might wish to adopt more stringent requirements for their own sources.

In deference to the principle of state sovereignty, therefore, Congress enacted a "savings clause" in section 510 that allows states to impose more demanding standards on their own industries and municipalities.[31] Moreover, as construed by EPA and reviewing courts, section 510 precludes EPA from disapproving the adoption of more stringent standards by a state, even if the Agency considers the state standards to be unnecessarily or unreasonably stringent. *See, e.g.*, 54 Fed. Reg. 39,099 (1989); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).

The sovereignty rationale underlying section 510 ends at the state line, however, and in no way suggests that one state's decision to adopt more stringent standards

[31] *See e.g.*, H. Rep. No. 911, 92d Cong., 2d Sess. (1972), *reprinted in* 1 Leg. Hist. of 1972, at 753, 823.

should be binding on sources in *other* states.[32] Indeed, according to its own terms, section 510 limits the application of stricter standards adopted under this section to in-state sources, by explicitly protecting the right of each state to exercise exclusive jurisdiction over its own waters, except as expressly provided by the Act. CWA § 510(2).[33]

In light of this statutory language and purpose, this Court has consistently construed section 510 as authorizing a state to apply stricter standards only to in-state sources. In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), this Court explained that section 510 authorizes a state to "adopt more stringent limitations through state administrative processes [or through state common law] and apply them to *in-state* dischargers." *Id.* at 328 (emphasis added). Again in the *Ouellette* decision, this Court confirmed that a state's authority to regulate sources under section 510 is limited "to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State." 479 U.S. at 481 (emphasis in original).[34]

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[32] Interstate water quality disputes usually arise when a downstream state on an interstate waterway adopts a stricter water quality standard under section 510 that exceeds the federal minimum requirements. The Tenth Circuit's decision fails to recognize that there are federally-approved state standards for each state. CWA § 303. The issue before this Court is not *whether* to enforce a federally-approved standard, it is rather a question of *which one* of the federally-approved standards should control—that of the source state or that of the downstream state. Based on this Court's rationale in *Ouellette*, the standards of the source state should control when there are conflicting federally-approved state standards. *See* 479 U.S. at 491.

[33] Section 510(2) states that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

[34] Lower courts have consistently reached the same conclusion. *See, e.g., Illinois* v. *City of Milwaukee*, 731 F.2d 403, 413 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) ("In the light of the structure of [the CWA] . . . and in the light of the conflict and confusion which could result from any different construction, we conclude that [section 510] refers to the right of a state with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state.").

The Tenth Circuit's interpretation of the Act would simply nullify Congress' intent and this Court's prior construction of section 510. In the Tenth Circuit's view, EPA's approval of a section 510 standard justifies this extraordinary step, apparently on the theory that EPA approval transforms the state standard into federal law. Ark. P.A. at 13a, 14a & 14a n.5. But this theory ignores the fact that EPA approval of a section 510 standard is automatic; the Agency *cannot* disapprove a standard on the ground that it is too restrictive. *See supra* page 25. The court's theory also ignores EPA's longstanding judgment that despite federal approval, a state standard remains *state* law, rather than *federal* law.[35] The legislative history of the CWA similarly makes clear Congress' understanding that standards adopted under section 510 constitute state law and are not standards imposed under the Clean Water Act, much less federal standards.[36]

In addition to conflicting with section 510, the Tenth Circuit's decision would deprive source state agencies of the ability to administer the Act in the manner Congress intended. As this Court emphasized in *Ouellette*, Congress made each state accountable for setting its own standards based on local conditions, the impact of differ-

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[35] Memorandum: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control (Feb. 3, 1975), *incorporated in* In Re Bethlehem Steel Corporation, EPA General Counsel Op. No. 58 (Mar. 29, 1977). Other grounds given by EPA's General Counsel for reaching this conclusion were that federally-approved water quality standards are not directly enforceable, and that EPA approval of state water quality standards did not involve notice and comment rulemaking.

[36] For example, the Conference Report for the 1972 CWA Amendments explains that section 510 "provides that States . . . retain the right to set more restrictive standards and limitations *than those imposed under this Act.*" S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972), *reprinted in* 1 Leg. Hist. of 1972, at 281, 331 (emphasis added).

ent alternatives on municipal treatment facilities and local industries, and a variety of other social and economic considerations. 479 U.S. at 494.[37] This system will not work if the standards set by one state apply automatically to sources in all upstream states. The state imposing its standards will have little incentive to consider the interests of the other states, and the source state's ability to have *all* the relevant factors considered in setting standards and issuing permits will be vitated.[38] At the same time, the potential for overlapping and conflicting standards will cause widespread confusion and uncertainty about the applicable requirements and the ability of thousands of facilities to obtain new or renewed permits.[39]

Finally, the Tenth Circuit's decision threatens to create an impasse between upstream and downstream states, at the same time it eliminates EPA's intended role as a mediator for interstate water quality disputes. Since permit agencies are rigidly bound under the Tenth Circuit's view to apply a downstream state's standards, those states would have an unfettered veto over the permits for new and existing facilities in upstream states. This power creates the distinct risk—which history shows has

[37] *See, e.g.*, 117 Cong. Rec. 38,805 (Nov. 2, 1971), *reprinted in* 2 Leg. Hist. of 1972, at 1272.

[38] "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 92 (1984).

[39] One of the important goals of the CWA is to provide "clear and identifiable" standards that individual dischargers are required to meet. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 Leg. Hist. at 1415, 1499. This Court previously recognized in *Ouellette* that "[a]pplication of an affected State's law to an out-of-state source . . . would undermine the important goals of efficiency and predictability in the permit system." 479 U.S. at 496. The tangled patchwork of inconsistent and overlapping downstream state standards resulting from the Tenth Circuit's interpretation would make it virtually impossible to predict the standard for a lawful discharge. "It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure." *Id.* at 497.

been realized all too often—that some states may apply their law to discriminate against out-of-state facilities and unfairly advance their own economic interests.[40] But even under the best of circumstances, the Tenth Circuit's view would remove any incentive for downstream states to compromise their interests for the facilities and needs of another state. The downstream state interests would always control, and the only alternatives for source states would be to acquiesce or perhaps retaliate on rivers where they are downstream. Congress intended to prevent, not promote, this form of interstate warfare.

Congress further intended that if interstate disputes did arise, EPA would act as the mediator to *balance* the interests of both the upstream and downstream states.[41] By making downstream state standards automatically ap-

[40] Whether intentional or not, it would be very easy for a downstream state to selectively impose stricter standards on out-of-state sources under the court of appeals' decision. For example, the downstream state could simply set very stringent standards for the segment of a stream as it first enters that state, and then impose much more lenient standards for downstream segments into which the state's own sources discharge. Under such an arrangement, only sources in the upstream state would be required to meet the stricter standards, putting these upstream sources at a competitive disadvantage relative to similar sources in the downstream state. Indeed, in the present case, Oklahoma has set a very stringent standard for the segment of the Illinois River just inside its border with Arkansas, but has established a much more lenient standard further downstream on the same waterway, where most Oklahoma dischargers are located.

[41] The need for a federal mediator to resolve interstate water quality disputes has long been recognized by this Court. When the prolonged water quality dispute between the State of Illinois and the City of Milwaukee first came before this Court in 1972, the Court made federal courts the mediator in interstate water quality disputes through their application of federal common law. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 107 (1972). When the same dispute reappeared a decade later, the Court found that Congress had intended for EPA to replace the federal courts as the federal mediator when it enacted the 1972 CWA Amendments. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 326 (1981).

plicable, with no room left for deviation or federal interpretation, the Tenth Circuit's decision would nullify this federal intermediary role and disrupt the federal-state partnership established by Congress.[42] As shown above, the CWA attempts to prevent unjust and unreasonable consequences by giving EPA the discretion to balance the competing interests on a case-by-case basis and to impose additional effluent restrictions on upstream sources when necessary to protect downstream water quality. The Tenth Circuit's construction of the Act would destroy any basis for compromise between states and then leave the affected parties with no mediator having the power to strike a balance.[43]

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[42] *See, e.g.*, 118 Cong. Rec. 10,234 (Mar. 27, 1972) (statement of Rep. Roe), *reprinted in* 1 Leg. Hist. of 1972, at 426. The Solicitor General has previously emphasized the importance of Congress' careful allocation of state and federal responsibilities under the Clean Water Act. In its brief as amicus curiae opposing certiorari in *Scott* v. *City of Hammond, the United States* therefore explained that allowing a downstream state to regulate an out-of-state source would disrupt the delicate balance established by the Clean Water Act:

> The CWA creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. . . . Under this partnership, the states must defer to the federal government's choice of minimum national requirements but they reserve the unqualified power to determine to what degree they wish to impose more stringent pollution limitations within their borders. If . . . one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed. Where several states are situated on a particular body of water the state that has the most stringent limitations will displace the federal government as the arbiter of minimum pollution control requirements; this result is clearly contrary to the "full purposes and objectives of Congress."

Brief for the United States as Amicus Curiae at 10, *Scott* v. *City of Hammond, cert. denied*, 469 U.S. 1196 (1985) (No. 84-21) (citations omitted).

[43] As the United States' petition for certiorari here explained, the Tenth Circuit's decision has "undermined EPA's authority to implement the Clean Water Act by usurping EPA's role under the Act as the arbiter of interstate water pollution disputes." EPA Pet. at 13.

In light of the extraordinary constitutional implications of allowing one state to regulate conduct in another,[44] a reviewing court should be very reluctant to interpret a statute as having that effect absent an unequivocal mandate from Congress to do so. This Court has held in an analogous context that an "unmistakably clear" authorization from Congress is needed before one state can regulate entities in another state. *See, e.g., South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91-92 (1984). Here, there is no expression of any Congressional intent, much less a clear expression, that downstream states should be allowed through the NPDES permitting process to apply their water quality standards to an out-of-state source. In fact, the plain language, legislative history, and statutory structure all show the contrary, and if there were any doubt whatsoever about Congress' intent, the statute should not have been given the far-reaching interpretation adopted by the Tenth Circuit.

B. EPA Properly Exercised Its Discretion Under The Clean Water Act In This Case And Decided Not To Impose Additional Restrictions On The Fayetteville Discharge.

EPA did even more than the statute requires in this case, and the Tenth Circuit's rationale for overturning the Agency's permit decision rests on a mistaken interpretation of the law and EPA's obligations. As shown above, the Oklahoma water quality standards are not directly applicable to a facility in Arkansas, and EPA was not required to assure that the Fayetteville discharge would comply with those standards. Instead, EPA was required to *consider* those standards and the impact of the discharge on downstream water quality, and to then make a case-

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[44] It is a well-established principle that one state cannot extend its regulatory authority into another state. As this Court explained long ago in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), "no state can legislate for, or impose its own policy upon the other. . . . One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state . . . can impose its own legislation on no one of the others." *Id.* at 95-98.

specific determination whether additional limitations on the Fayetteville discharge were appropriate in light of all the circumstances.

Before making its decision to approve the permit, EPA was fully aware of Oklahoma's views and interpretation of the relevant water quality standards. Despite those views, and regardless of whether Oklahoma's interpretation of the standards was correct, EPA found that no additional limitations were needed to protect Oklahoma water quality. Specifically, after evaluating Fayetteville's permit application, the EPA Administrator made an initial threshold determination that the Fayetteville facility would have no adverse impact on the water of Oklahoma. *See* Ark. P.A. at 100a.[45] EPA nevertheless granted Oklahoma a discretionary evidentiary hearing to challenge that finding and EPA's consideration of the Oklahoma water quality standards. *See* Ark. P.A. at 96a. Following that evidentiary hearing, the ALJ and CJO upheld the Agency's decision to approve the permit, based on the finding that the Fayetteville discharge would have no adverse effect on Oklahoma water quality. *See* Ark. P.A. at 151a; *supra* pages 5-7.

None of the "errors" identified by the Tenth Circuit provide a legal basis for upsetting this exercise of the agency's discretion. For even if EPA did "misinterpret" the Oklahoma standards—a point addressed below—these standards were not legally binding, and the discretion to require compliance necessarily subsumes the discretion to interpret. Moreover, EPA's finding that the Fayetteville discharge would have *no detectable impact* on Oklahoma water quality does not in any way depend upon

[45] As a result, the notice and hearing provisions of section 401(a)(2) were not triggered. The statute provides that the 401(a)(2) requirements are only triggered by a threshold finding that the water quality of a downstream state will be adversely "affected" by a proposed discharge in an upstream state. *See supra* page 15. Both the ALJ and the CJO upheld the Administrator's determination that the 401(a)(2) procedures were not triggered in this case. Ark. P.A. at 100a, 109a n.3.

the interpretation of the Oklahoma standards here. Ark. P.A. at 151a. Under these circumstances, EPA's decision not to impose additional limitations on the discharge had to be a proper exercise of its discretion.

II. EVEN IF THE STANDARDS OF A DOWNSTREAM STATE WERE APPLICABLE TO A FACILITY IN AN UPSTREAM STATE, THE FAYETTEVILLE DISCHARGE COMPLIES WITH THE RELEVANT OKLAHOMA STANDARDS.

The Tenth Circuit's decision must also be reversed even if the Clean Water Act were somehow interpreted as making downstream state standards legally "applicable" to upstream sources. For even though it was not required to do so, EPA did thoroughly consider the Oklahoma water quality standards here before granting the permit, and the Agency made detailed findings that the Fayetteville discharge would not violate those standards.

While the Tenth Circuit may have reached a different conclusion if it were the initial decisionmaker, the Clean Water Act and the findings made by EPA still require that the Agency's decision be upheld on *each* of the following three grounds: (A) EPA properly found that the Fayetteville discharge would "comply" with the Oklahoma standards, as a matter of federal law, because the discharge would not cause any "actual detectable" violation of those standards; (B) Congress affirmatively gave EPA the discretion to interpret downstream state standards when making permit decisions, and the Tenth Circuit's reversal expressly rested on a refusal to afford the agency that deference; and (C) even if the court's preferred interpretation of the Oklahoma standards were correct, the specific 'errors" cited by the Tenth Circuit were harmless, given the Agency's factual findings. The Tenth Circuit therefore lacked any basis for overturning the permit or even remanding the case to EPA.

A. The Clean Water Act Allows EPA To Conclude That Sources Having No Detectable Impact On Water Quality Would Comply With Downstream Standards.

EPA's Chief Judicial Officer, acting on behalf of the Administrator, held here that the Fayetteville facility would comply with the downstream Oklahoma standards absent evidence that the discharge would cause "an actual *detectable* violation" of Oklahoma's standards. Ark. P.A. at 117a. A minor transgression of the downstream state's standards "predicted through modeling but not expected to be actually detectable or measurable . . . should not by itself block the issuance of the permit." *Id.* In adopting this interpretation of the word "comply" the CJO also recognized that "[t]he element of detectability is implied in EPA's regulations." *Id.* n.16.[46]

The Tenth Circuit provided no reason or explanation for rejecting EPA's construction of the CWA as providing a "detectability" threshold for evaluating compliance with a downstream state's water quality standards. The court of appeals did not disturb EPA's finding that the Fayetteville discharge will have no detectable effect on Oklahoma water quality. Ark. P.A. at 78a. But by overturning EPA's decision to approve the permit, the court must either have ignored or rejected the Agency's interpretation of the CWA regarding the significance of detectability.[47]

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[46] *See also* EPA Pet. at 24-25 ("At least where the effects of a discharge are undetectable at the State boundary, the receiving State can have little more than a theoretical basis for concluding that its water has been degraded. In such circumstances, it is at least reasonable for the responsible agency to conclude that the balance of equities favor permitting the discharge and that the discharge is not prohibited.").

[47] Somewhat inconsistently with this result, the court did agree at one point in its opinion that "[t]he ability, as well as the authority, to require compliance with the WQS of downstream states is necessarily limited by the ability to measure a source's impact on the water quality of the receiving waters." Ark. P.A. at 24a.

EPA's construction of the Act in this regard must be permissible. Nothing in the Act requires a different interpretation of compliance or precludes tying that term to detectability on a case-by-case basis. Indeed, EPA's conclusion is strongly *supported* by the provisions of the CWA that directly address the interstate application of water quality standards. For example, the requirements of section 401(a)(2) to notify a downstream state and consider that state's standards are only triggered by a threshold finding that the proposed discharge "may *affect*, as determined by the Administrator, the quality of the waters of any other State." CWA § 401(a)(2) (emphasis added).[48] It is entirely reasonable, therefore, for EPA to conclude that a discharge having no measurable or detectable impact on a downstream state's water quality will not "affect" such waterways.

EPA properly applied this interpretation of the CWA in the instant case and made the requisite factual finding of "no effect" under section 401. As stated by the ALJ:

> It should be noted that the requirements for public hearing under Section 401 are only triggered if the Administrator or the issuing Agency determines that the discharge will have an adverse impact on the waters of the receiving state. In this instance the Administrator, after evaluating the record, determined that no such impact would exist and therefore notification of the State of Oklahoma was not given and no public hearing under Section 401, as just described was ever held.

Ark. P.A. at 100a.[49] The CJO subsequently upheld the Administrator's threshold determination, that the section

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[48] Similarly, section 402(b)(5) also requires a threshold finding by the permitting agency that a downstream state's water quality "may be affected" in order to trigger the requirements of that provision.

[49] Oklahoma was given a second opportunity to challenge EPA's finding that the Fayetteville discharge would comply with Oklahoma water quality standards at an evidentiary hearing before the ALJ. Based on all the evidence, the ALJ still found that Fayetteville's discharge would have no detectable impact on the downstream state's waters. Ark. P.A. at 127a-143a.

401 requirements were not triggered because the Fayetteville discharge would not "affect" the water quality of Oklahoma, and the CJO also adopted the detectability test for compliance described above. *See* Ark. P.A. at 109a n3, 117a & n.16.

The element of "detectability" is an essential prerequisite of any duty to comply with the water quality standards of a downstream state. As the CJO concluded: "Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance." Ark. P.A. at 118 n.16 (quoting *Champion International Corp.* v. *EPA*, 648 F. Supp. 1390, 1395 (W.D.N.C. 1986)). Indeed, without the detectability threshold implicit in the CWA and EPA's regulations, there often would be no way of determining compliance and the Agency's task would be impossible.

In sum, even if the Act were read as requiring upstream sources to "comply" with downstream state standards, as the Tenth Circuit erroneously did here, EPA must have the discretion to define the meaning of "comply." The Tenth Circuit gave no reason for rejecting EPA's construction of the Act and the Agency's regulations on this point, and EPA's conclusion about the meaning of "comply" must be upheld as a matter of federal law, as well as the Agency's application of that test in this case.

B. The Court Of Appeals Should Have Deferred To EPA's Interpretation Of The Oklahoma Water Quality Standards.

The Tenth Circuit also erred by refusing to defer to EPA's construction and application of the Oklahoma standards. Settled principles of judicial review and Congress' specific delegation of responsibility here to EPA both required the court to respect the Agency's interpretation absent a showing that EPA's view was clearly erroneous. Consequently, the Tenth Circuit's decision must be reversed, and the Agency's permit decision upheld, on this ground as well.

Based on its own interpretation of the Oklahoma standards and evaluation of the factual record, the Tenth Circuit concluded here that EPA had incorrectly construed and applied the Oklahoma water quality standards. Ark. P.A. at 53a. In substituting its interpretation of the Oklahoma standards for that of the expert agency responsible for administrating the statute—and even expressly declining to afford EPA any deference—the court of appeals exceeded the proper scope of judicial review.

This Court has long held that a reviewing court must defer to an agency's reasonable interpretation of its own administrative regulations. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."). *See also Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988). The Clean Water Act also requires deference to EPA's interpretation of state standards, at least in the interstate context, because EPA itself is responsible for setting the federal minimum requirements. Moreover, Congress gave EPA the task of reviewing and approving all such standards for consistency with such requirements. This deference is particularly appropriate where the relevant state standards are based on EPA's own model standards,[50] and EPA is acting as the permitting agency.

To the extent that Congress directed EPA to consider or apply the standards of downstream states in permit decisions, Congress must also have delegated to EPA the authority to interpret these standards.[51] Instead of de-

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[50] As EPA explained in its petition for certiorari, "[i]n determining whether a proposed standard meets the statutory requirement, it is, of course, necessary for EPA to determine the meaning of that standard. Therefore, if a dispute concerning the meaning of the standard subsequently arises in the context of a permitting decision, EPA's interpretation of the disputed provision, which will reflect its understanding of that provision when approval to implement it was granted, should normally be dispositive."

[51] For example, when EPA is the permitting authority, section 401(a)(2) authorizes EPA, not the downstream state, to hold a

ferring to EPA's reasonable interpretation of the Oklahoma water quality standards, the court of appeals rejected EPA's construction and application of the Oklahoma standards in favor of its own interpretation. In so doing, the court plainly exceeded the appropriate role for a reviewing court.

C. The Specific "Errors" Identified By The Tenth Circuit Were Harmless And Do Not Affect The Validity of EPA's Decision.

A final reason that EPA's permit decision must be upheld—even if the Oklahoma standards were applicable and were misinterpreted by EPA—is that the specific "errors" found by the Tenth Circuit were plainly harmless. Given the specific findings of fact made by the ALJ with respect to each of the standards raised by Oklahoma, the errors could not affect the substance or outcome of EPA's decision.[52]

The first error identified by the Tenth Circuit is that the ALJ appeared to believe the Oklahoma nutrients standards applied only to lakes and not to streams. Ark. P.A. at 45a-46a. But even if the ALJ did err in construing the nutrients standard, the error was clearly harmless. The water segment where there was the greatest risk of Fayetteville causing a noncompliance with the

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hearing and make a determination about whether additional conditions should be imposed in light of a downstream state's water quality standards. In contrast, section 401(a)(1) gives the *source state* final interpretive authority through the certification procedure to determine whether a federally-issued permit will comply with its standards. Thus, section 401 expressly allocates the interpretive authority to source states when standards are applied intrastate, but assigns the authority to EPA to construe and apply standards in the interstate context.

[52] In light of its subsequent holding that the CWA required a permit ban upstream from existing water quality violations, *see infra* p. 42, the court of appeals did not decide whether the "errors" committed by EPA were serious enough to warrant remand to the Agency. *See* Ark. P.A. at 53a. As shown below, they plainly were not.

Oklahoma nutrients standard was Lake Francis.[53] The water in Lake Francis is shallow and slow moving, and therefore presents the greatest danger of accumulated concentrations of nutrients. Yet the ALJ found, and the court did not question this finding, that the Fayetteville discharge would *not* cause a violation of the Oklahoma nutrients standard in Lake Francis.[54] A fortiori, the same discharge could not cause a violation of the nutrients standard in the more rapidly flowing segments of the Illinois River downstream from Lake Francis and the asserted misinterpretation was plainly inconsequential.[55]

Next, the court found that the ALJ erred by applying the 1985, rather than the 1982, Oklahoma water quality standards. Ark. P.A. at 52a. EPA's Chief Judicial Officer specifically considered this error and explained that it was harmless, because there are no material differences between the 1982 and 1985 Oklahoma standards that are relevant to this case. Ark. P.A. at 149a-150a. The court of appeals barely mentioned this explanation by the CJO, much less gave a sufficient reason for rejecting it, since the court itself did not identify any difference between the two sets of standards that could have changed the result reached by EPA. Indeed, the Arkansas parties contended in the proceedings below that if EPA applied any Oklahoma standards, it should apply the 1982 standards, in part because they were easier to satisfy than the 1985 standards. *See* Ark. P.A. at 123a. There-

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[53] *See, e.g.*, Ark. P.A. at 57a-60a (focus of most of the concern and testimony at the evidentiary hearing was the water quality problems of Lake Francis).

[54] Ark. P.A. at 127a-132a.

[55] Lake Francis is an artificial lake formed by a dam on the Illinois River just inside the Oklahoma/Arkansas border. Thus, it is the segment of the Illinois River in Oklahoma closest to the Fayetteville discharge and would be expected to receive the highest nutrient concentrations. Moreover, nutrients tend to accumulate to a much greater extent in a shallow sedentary lake than in a flowing river.

fore, the CJO correctly concluded that since the ALJ found the Fayetteville discharge would comply with the stricter 1985 standards, that finding also supported his own conclusion that the discharge would comply with the similar, but slightly less stringent, 1982 standards.

Finally, the court suggested that EPA erred by placing the burden of proof on Oklahoma to show why the permit should not be issued, rather than on the Agency and the permit applicant to demonstrate that the proposed discharge would comply with all applicable requirements under the CWA. Ark. P.A. 52a-53a. This "error" is based on a misinterpretation of the ALJ's decision, since the ALJ in fact placed the burden on the permit applicant[56] and Fayetteville met that burden in this case.[57] EPA had originally issued the permit, following a hearing and written comments on the draft permit, based on its finding that the proposed discharge would comply with all applicable requirements. When Oklahoma challenged the final permit at the evidentiary hearing granted by EPA, the Agency and the permit applicant again met their burden of coming forward with an affirmative case to support the final permit. *See* 40 C.F.R. § 124.85(a)(2). At this point, the Oklahoma parties, who were challenging the permit, had the burden of coming forward to present an affirmative case with respect to the permit conditions they were challenging. *Id.* § 124.85(a)(3). It was this burden that the Oklahoma parties failed to meet,

[56] The ALJ clearly placed the burden of proof on the permit applicant: "Based on the voluminous administrative record . . . I am of the opinion that *the permit applicant has successfully borne the burden* of persuading the writer that the permit . . . should be issued and not denied and that the evidence put forth by the Oklahoma parties was not sufficiently strong to persuade this writer that the permit should be denied or otherwise be invalid." Ark. P.A. at 105a (emphasis added).

[57] The CJO, in upholding the ALJ's decision, determined that the ALJ had properly found that "the record shows by a preponderance of the evidence that the authorized discharges would not cause . . . [a] violation of Oklahoma's water quality standards." Ark. P.A. at 151a.

since the ALJ conducted a thorough review of the evidence for each parameter of Oklahoma water quality that could possibly be affected by the Fayetteville discharge, and he concluded that the evidence presented at the hearing demonstrated that the discharge would cause no violation of Oklahoma water quality standards.[58] Thus, EPA and the permit applicant did satisfy their burden of proof, and the court's conclusion that the agency erred in assigning the burden to Oklahoma was mistaken.[59]

Whether considered individually or collectively, none of the errors cited by the Tenth Circuit are of sufficient importance to call into question the Agency's conclusion that the Fayetteville discharge will fully comply with all Oklahoma water quality standards.[60] The court of appeals

[58] Ark. P.A. at 127a-143a.

[59] Moreover, when the disputed issue is whether an out-of-state facility will comply with the standards of a downstream state, the legislative history of the CWA clearly indicates that Congress intended to place the burden of proof on the downstream state to demonstrate that its waters would be unreasonably impaired by the out-of-state discharge. *See* 118 Cong. Rec. 33,712 (Oct. 4, 1972) (statement of Sen. Tunney), *reprinted in* 1 Leg. Hist. of 1972, at 209 (EPA can only veto a permit affecting a downstream state "where the Governor of a downstream State demonstrates that his waters are being polluted by permitted effluent discharges in another State"); 118 Cong. Rec. 33,752 (Oct. 4, 1972) (statement of Rep. Jones), *reprinted in* 1 Leg. Hist. of 1972, at 238 (same).

[60] The court of appeals also criticized some of the ALJ's factual findings on eutrophication. Ark. P.A. at 67a n.47, 74a. However, as EPA's certiorari petition stated, "the court took statements of the ALJ out of context, focused on the irrelevant, and materially misconceived what the ALJ did say." EPA Pet. at 19. The court of appeals' assessment of the facts relied almost exclusively on the prefiled testimony of the Oklahoma expert witnesses, but the court failed to recognize that virtually all of the testimony was retracted or substantially qualified during cross-examination at the evidentiary hearing. *See, e.g.*, Ark. P.A. at 103 (all Oklahoma expert witnesses admitted on cross-examination that any impact from the Fayetteville discharge would be non-detectable and only theoretical). The court's mistaken impression about the facts of this complex, technical case demonstrate the dangers of allowing a reviewing

lacked any legitimate ground for failing to defer to EPA's interpretation and application of the federally-approved Oklahoma standards, or for disturbing the Agency's findings that the Fayetteville discharge will fully comply with the Oklahoma standards.

III. THE CLEAN WATER ACT DOES NOT REQUIRE A BAN ON NEW PERMITS UPSTREAM FROM A PRE-EXISTING WATER QUALITY VIOLATION.

After identifying the errors discussed above, the court actually overturned EPA's permit decision based on an issue not even raised by Oklahoma. Specifically, in a second major holding, the court concluded that the Clean Water Act requires imposing a ban on new permits upstream from any segment of the waterway with pre-existing water quality violations. This harsh new rule would unfairly punish new permit applicants for the problems created by existing facilities and other sources of pollution, and was never intended by Congress. Instead, Congress intended a fundamentally different and more reasonable approach when it enacted the CWA. In particular, the 1972 CWA Amendments rejected a categorical ban on new sources in favor of giving state agencies flexibility to allocate the responsibility for reducing pollution levels fairly among the sources actually causing or contributing to existing water quality problems.

In contrast, the Tenth Circuit's extreme approach would impose a rigid ban on new facilities in many areas of the country. Moreover, because it only applies to new discharges, the Tenth Circuit's permit ban would discourage municipalities and industries from building new, modern facilities to replace old existing plants that are equipped with outdated pollution control technologies. The end result of the Tenth Circuit's holding will therefore be counterproductive to all the goals embodied in the Clean Water Act.

court to dabble in massive administrative records, especially those involving highly scientific matters. "[A] reviewing court must generally be at its most deferential" when reviewing scientific determinations, as opposed to simple findings of fact. *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983.

Although the Tenth Circuit's decision is ambiguous in many respects, the court clearly based its imposition of the permit ban upon an interpretation of the CWA and its view of the Act's purposes.[61] Thus, the court emphasized that "EPA's express power and obligations under the CWA necessarily subsume the power to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving water do not meet required standards." Ark. P.A. at 81a-82a.[62] Even though the court could point to no specific statutory provisions supporting this construction of the Act, it nonetheless concluded that "Congress cannot reasonably be presumed to have intended" that new permits would be approved upstream from an existing violation. Ark. P.A. at 78a.[63]

[61] The court's permit ban holding is already being interpreted and applied by the U.S. Government in various permit proceedings as deriving from the CWA. *See* EPA, *In the Matter of: City of Waskom, Texas*, NPDES Appeal No. 90-18, at 6 (Jan. 28, 1991). *See also* Comment of U.S. Dept. of the Interior, Fish and Wildlife Service, on NPDES draft permit AK-004978-6, to U.S. EPA, Region 10 (Feb. 12, 1991) (interpreting Tenth Circuit's holding as requiring a ban on new permits upstream from an existing water quality violation in Alaska).

[62] *See also* Ark. P.A. at 83a ("Particularly in light of the existing pollution of the Illinois scenic river, the agency's decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement.").

[63] An alternative reading of the Tenth Circuit's holding is that the Oklahoma antidegradation policy requires a ban on new permits upstream from an existing violation of the standard. However, the court of appeals' own interpretation of this Oklahoma standard in other parts of its opinion was clearly inconsistent with such a reading. *See* Ark. P.A. at 49a. Furthermore, the permit ban holding lacks any foundation in the Oklahoma antidegradation standard, because this standard does not in any way suggest or imply that it would apply differently, depending on whether or not there is an existing downstream violation of the standard. The standard only

Despite basing its permit ban holding on an interpretation of the goals and purposes of the CWA, the court admitted that there was no "*explicit* imprimatur" in the CWA for its holding. Ark. P.A. at 81a. Moreover, the court acknowledged that its approach was revolutionary, having never been suggested by any party in the briefs or oral argument, or indeed even hinted at in any of the dozens of CWA cases decided by federal courts. Ark. P.A. at 54a nn.39 & 40. The court nevertheless held that EPA's failure to consider the consequences of a pre-existing violation of Oklahoma's water quality standards was "the principal flaw in the agency's decision-making rationale" which required denial of the permit. Ark. P.A. at 75a.

In elaborating the terms of this new rule, the Tenth Circuit identified three findings that are needed to trigger the imposition of this permit ban on new sources. Ark. P.A. at 55a. First, there must be a pre-existing in-state or out-of-state violation of an applicable downstream water quality standard.[64] Second, some amount of a source's discharge, even if undetectable, must reach the downstream segment experiencing a water quality violation. *See* Ark. P.A. at 65a.[65] Finally, the existing downstream violation must have been "caused at least in part by pollutants that are constituents of [the source's] effluent." Ark. P.A. at 72a. Although EPA had made no

addresses the prospective impact of a proposed activity, and past degradation by other sources is not a relevant consideration in application of the standard to new sources.

[64] Of course, if as demonstrated above, the water quality standards of a downstream state do not automatically apply to an out-of-state source, then nonattainment of a downstream standard would only result in a permit ban within that downstream state.

[65] A new permit cannot be approved if "*any* amount of that effluent can reasonably be expected to reach the degraded waters." Ark. P.A. at 82a n.58 (emphasis added). In theory, under the Tenth Circuit's holding, a single molecule of effluent reaching the downstream segment would trigger the permit ban. It is hard to imagine how a permit applicant could prove that *none* of its effluent would reach the downstream segment.

findings on these newly-formulated conditions, the court made its own independent evaluation of the record and concluded that all three conditions were met and therefore the Fayetteville permit was prohibited as a matter of federal law. Ark. P.A. at 71a-72a.

The Tenth Circuit's imposition of a permit ban based on its own novel interpretation of the Clean Water Act clearly exceeds the appropriate role for a reviewing court under this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).[66] Under the initial step in the analysis mandated by *Chevron*, a reviewing court must look to see whether Congress has directly spoken to the precise question at issue. *Id.* In the event Congress has not spoken of its intent or a particular issue is ambiguous, *Chevron* then requires a reviewing court to defer to the agency's construction of the statute, rather than simply adopt its own. 467 U.S. at 842-43.

The Tenth Circuit's decision cannot be sustained under this analysis. Even the court below acknowledged that no provision in the Act expressly supported imposing this permit ban. Ark. P.A. at 81a. In fact, Congress clearly intended *not* to impose such a ban, as shown below. Moreover, the *court* certainly should not have undertaken the crafting and imposition of this ban in the first instance.

[66] The Tenth Circuit's permit ban is analogous to the construction ban required in nonattainment areas under the Clean Air Act. 42 U.S.C. § 7410(a)(2)(I) (1988). However, the construction ban required by the Clean Air Act was enacted by Congress, whereas the Tenth Circuit acted without Congressional authorization or support in imposing a construction ban for nonattainment areas under the CWA. Furthermore, the construction ban imposed under the CWA by the Tenth Circuit is much more extreme than the ban required by the Clean Air Act. Unlike the Clean Air Act, the Tenth Circuit's ban extends beyond the area of nonattainment to all upstream water segments, and does not contain an exception for new sources that "offset" new discharges with equivalent reductions from existing sources in the same area. *See* 42 U.S.C. § 7503 (1988).

As the agency responsible for administering the CWA, EPA has never suggested that an existing violation of water quality standards automatically requires an absolute ban on new permits, especially for discharges that will have no detectable effect on water quality.

The Tenth Circuit's holding is not only inconsistent with EPA's administration of the CWA, but it is also contradicted by several express provisions in the CWA, which the court of appeals completely overlooked, for dealing with ongoing violations of water quality standards. The statutory scheme created by Congress in the 1972 CWA amendments included two strategies intended to bring about improvements in water quality on the nation's many degraded waterways.[67] The first was to shift the focus of the Act from water quality standards to national technology-based effluent limitations that applied automatically to every point source.[68] Congress expected that water quality would improve steadily as effluent limitations based on best available technology become progressively more stringent over time.[69]

The second element of Congress' strategy attacked the problem of nonattainment with water quality standards

[67] At the time the NPDES permitting program was enacted in the 1972 CWA Amendments, many of the nation's waterways were severely polluted, yet Congress never suggested that this would require a ban on new permits for affected waterways. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

[68] CWA § 301(b)(1). *See supra* note 9. Congress described the pre-1972 approach of controlling water pollution, which placed primary reliance on ambient water quality standards, as "inadequate in every vital respect." S. Rep. No. 414, 93d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

[69] *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 42 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1460 ("the program established by this section requires increasingly tougher controls on industry . . . [I]ndustry will be required every five years to re-evaluate its control efforts and to apply the best technology then available . . . [and] industries will have to show every five years that no-discharge is not attainable.").

directly. Specifically, the Act requires state agencies to identify sources that are contributing to ongoing water quality violations, and to implement plans for reducing discharges from such sources to bring the affected waterways into compliance. The principle underlying this approach chosen by Congress was that the responsibility for improving water quality should be placed on those sources that are causing the problems, not on new sources that may be built later.

The key provision of this statutory scheme is section 303(d), which requires states to establish maximum daily loads necessary to bring waterways with existing water quality violations into compliance.[70] EPA's implementing regulations require the state to adopt a waste load allocation plan that distributes the allowable maximum daily load among all dischargers.[71] Whereas the Tenth Circuit's holding would require a categorical ban on new discharges, section 303(d) authorizes the state to allocate equitably the burden of reducing waste loads between new and existing sources. Thus, if the state has established a maximum daily load for a given waterway, new sources or increased discharges from existing sources would be permitted provided they are included in the waste load allocation plan.[72]

The approach adopted by Congress in section 303(d) is reinforced by section 208, which requires states to de-

[70] A maximum daily load is the total quantity of effluent that can be discharged into a waterway per day without exceeding the relevant water quality standards.

[71] 40 C.F.R. § 130.7. Section 303(d) does not require a state to establish immediately maximum daily loads for all waterways with existing water quality violations. Rather, the Act directs states to establish such plans incrementally according to the state's own priority ranking of its waterways, with no fixed deadline for completing the process for all waterways. CWA § 303(d)(1)(A).

[72] In this case, Oklahoma has not established a maximum daily load or waste load allocation plan for the Oklahoma segments of the Illinois River that are allegedly experiencing ongoing violations of Oklahoma water quality standards.

velop and implement "areawide waste treatment management plans" for regions experiencing "substantial water quality control problems." [73] Under this planning process, states must identify the causes of water quality violations, and allocate the responsibility for alleviating these problems. CWA § 208(b)(2). Section 208 directs states to consider all point and non-point sources of pollution in the planning process, and to include in their management plans the many different strategies and methods for controlling pollution that are expressly required by section 208(b)(2). Significantly, the extensive repertoire of specific control strategies required by Congress in this section *does not* include a ban on new sources.

In short, the CWA expressly provides a specific and comprehensive strategy for the improvement of water quality on polluted waterways.[74] The Tenth Circuit ignored these provisions, and instead created its own novel solution to address a problem that Congress had expressly dealt with by taking a very different approach. In so doing, the court adopted an approach that not only conflicts with the choices made by Congress, but also threatens to seriously disrupt the effort of EPA and the states to implement the programs intended by Congress to improve water quality. In particular, the Tenth Circuit's holding would force agencies to divert their focus from controlling existing sources that are the cause of ongoing water quality violations to prohibiting new sources regardless of whether they will contribute to or cause water quality violations.

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[73] When one or more states share a region or waterway with common water quality control problems, section 208 requires states to "consult and cooperate" in developing and implementing a joint management plan. CWA § 208(a)(3).

[74] Section 304(1) is yet another provision that addresses how to ameliorate ongoing water quality violations. This provision requires states to identify waterways with ongoing violations of water quality standards caused by toxic pollutants, and to impose "individual control strategies" on point sources that the state identifies as contributing to such violations.

Moreover, the shift in emphasis from imposing additional controls on existing sources to banning new sources altogether, regardless of their impact on water quality, will ultimately be counterproductive to Congress' goal of improving water quality. Since only new discharges are affected by the Tenth Circuit's ban, municipalities and businesses will be given an incentive to continue operating existing, often outmoded facilities, rather than building new, state-of-the-art plants that may be denied a permit under the court's holding. But because new facilities are required to incorporate the best and most recent technology for controlling pollution under section 306 of the Act, the replacement of aging facilities equipped with obsolete pollution control technologies would otherwise produce a net benefit for the environment.[75]

The Tenth Circuit's imposition of an absolute and immediate permit ban, based on its view of the best remedy to fulfill the Act's purposes, was thus manifestly inappropriate. Unless overturned, the Tenth Circuit's exercise in creative judicial lawmaking will block any new industrial or economic development in a substantial portion of the nation. Such an extreme result was never envisioned by Congress, and is totally unnecessary and even counterproductive. The Tenth Circuit's "principal" reason for overturning the Fayetteville permit therefore directly conflicts with the Clean Water Act and EPA's administration of the Act, and must be reversed.

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[75] Such is the case with the replacement of the old Fayetteville wastewater treatment plant by the construction of a new state-of-the-art facility. In addition to being counterproductive, the Tenth Circuit's holding would unfairly hold new permit applicants responsible for the problems created by existing facilities. Indeed, the Tenth Circuit admitted that it is "arguably unfair to 'punish' Fayetteville for pre-existing dischargers' past failure to comply with WQS." Ark. P.A. at 81a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the NPDES permit issued to Fayetteville should be upheld.

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